

AMERICAN POZZOLAN CORPORATION

IBLA 72-234

Decided July 14, 1972

Appeal from a decision of the Bureau of Land Management's state director for New Mexico, refusing to extend time for removal of sale of mineral materials, (cinders) NM-0437658.

Affirmed.

Materials Act: Generally

A request for extension of time in which to remove mineral materials (cinders) is properly denied where the purchaser failed to comply with the sale terms within the five-year period of the contract or during the ensuing three one-year extensions, and where it is not shown that the delay in the removal was due to causes beyond the control of the purchaser.

APPEARANCES: James J. Aycock, Esq. of Johnson, Allen and Aycock, for the appellant.

OPINION BY MR. FRISHBERG

By contract of August 14, 1963, the appellant purchased 200,000 tons of cinders at an agreed price of \$24,000. The contract provided that all the purchased material would be removed within a five-year period and the payment would be made in that same period of time. Although the full purchase price of \$24,000 has been paid, only slightly over one-half the tonnage contracted for was removed in the nine years since this contract was executed. The purchaser-appellant was afforded three one-year extension periods after the original five-year term had expired. When the third extension was granted, it was informed that no further extension would be considered after August 13, 1971. Nevertheless, the appellant again asked for a one-year extension. In his decision the state director informed the purchaser that it could remove material to and including August 13, 1972, in accordance with section 25 of the contract, but that any removal thereafter would be in trespass.

The appellant points to past market conditions as the reason for nonremoval of materials. It asserts that the United States is not damaged by nonremoval and that the time in which to remove should

be extended or that a proportionate share of the purchase price should be refunded. The appellant also indicates that it is even negotiating a possible sale which would help alleviate its losses.

Section 25 of the contract authorizes an extension if the purchaser shows that his delay in performance is due to circumstances beyond his control and that the extension will not prejudice the government's interests. It permits an additional year to remove materials previously mined. The appellant seeks additional time beyond this fourth year extended term in which to mine and remove the materials.

In Nordic Veneers, Inc., 3 IBLA 86 (August 2, 1971), and Clark Canyon Lumber Company, 3 IBLA 247 (September 17, 1971), we held that a business recession or a depressed market is no excuse within "beyond control" exceptions contained in the exculpatory clause of a sales contract, and that an extension will be granted for such reasons alone. While the appellant's desire to salvage some portion of its remaining investment is understandable, the fact remains that there is no certainty that it could do so even if a further reasonable period were afforded. In any event, it has not established a basis for extension within the ambit of its contract. Thus there appears no cogent reason to modify or reverse the decision appealed from.

Regarding appellant's request for a refund, we cannot now ascertain whether the purchaser may be liable for restoration costs or to what extent the Government will be able to meet its obligation to appellant to mitigate damages by reselling the material. These determinations will have to be made after expiration of the period for removal, August 14, 1972, at the local level.

Therefore, pursuant to the authority delegated to the Board of Land Appeals, 211 DM 13.5, the decision appealed from is affirmed.

Newton Frishberg, Chairman

We concur:

Frederick Fishman, Member

Anne Poindexter Lewis, Member

